

SOUTH AFRICA / JUDGMENT

# Lund and Another v Community Schemes Ombud Service and Others (006069/2022) [2024] ZAGPJHC 632; [2024] 4 All SA 608 (GJ) (10 July 2024) [2024] ZAGPJHC 632

## COURT

South Gauteng High Court, Johannesburg

## BEFORE

B C Wanless

## CASE / FILE NUMBER

006069/2022

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## Source record

## SAFLII

## Note: Certain

personal/private details of parties or witnesses have been redacted from this document in compliance with the law and SAFLII

## Policy

## FLYNOTES:

## PROPERTY

– Community schemes – CSOS – Unfair

procedure by adjudicator – No attendance by parties and evidence not called for – Award reviewed and set aside –

For CSOS or adjudicator to be liable for costs, required that they acted unlawfully or with gross negligence or in bad faith –

Opinion of court that legislature should give serious consideration to effecting amendment to subsection 33(b) of CSOS

Act by deleting word "grossly" before "negligent"

– Community Schemes Ombud Service

Act 9 of 2011, s 33(b).

## REPUBLIC

## OF SOUTH AFRICA

## IN

## THE HIGH COURT OF SOUTH AFRICA

## GAUTENG

## DIVISION, JOHANNESBURG

CASE  
NO: 006069/2022  
1. REPORTABLE: YES  
2.OF INTEREST TO OTHER  
JUDGES: YES  
3. REVISED: YES  
10 July 2024  
In  
the matter between  
SUE  
ANN LUND First  
Applicant  
MARK  
JOHN BAARD  
Second Applicant  
and  
COMMUNITY  
SCHEMES  
OMBUD  
SERVICE  
First Respondent  
ANDRE  
ANDREAS Second  
Respondent  
DEVON  
PLACE BODY CORPORATE Third  
Respondent

## JUDGMENT

WANLESS J

### Introduction

- [1] The First Applicant is Susan Ann Lund, an adult female ("the First Applicant") and Mark John Baard, an adult male, is the Second Applicant ("the Second Applicant"). For ease of reference the First applicant and the Second applicant will be referred to throughout this judgment as "the Applicants" unless it is necessary to specifically refer to an applicant in his or her individual capacity. The First Respondent is the Community Schemes Ombud Service ("CSOS"), a statutory body established in terms of section 3 of the Community Schemes Ombud Services Act[1] ("the CSOS Act") and the Second Respondent is Andre Andreas, an adult male adjudicator of CSOS ("the adjudicator"). Finally, the Third Respondent is the Body Corporate Devon Place ("the BC") established in terms of the Sectional Titles Act[2] ("the STA") which is governed by the STA and the Sectional Titles Schemes Management Act[3] ("the STSMA").

- [2] The Applicants are joint owners of a residential sectional title unit, being Section 3[...] D[...] P[...], R[...], also known as Unit 6[...], D[...] P[...], R[...] ("the unit"). The unit is part of the Sectional Title Scheme ("the scheme") established in terms of the STA, governed by the STA and STSMA. Most importantly, it is the scheme managed and run by the BC.
- [3] During 2020, certain disputes arose between the Applicants and the BC concerning the unit. The unit is located on the sixth floor of the scheme. These disputes resulted in the BC instituting proceedings ("the proceedings") with CSOS against the Applicants. The proceedings involved certain structures, building works and/or maintenance works on the rooftop area of the unit, located on the seventh floor of the scheme. This rooftop area forms a part of the exclusive use area attaching to the unit.
- [4] The proceedings were opposed by the Applicants who also sought certain relief in relation to the same disputes. Arising therefrom the award granted by the adjudicator ("the award") on 31 May 2021, granted the relief sought by the BC and dismissed the relief sought by the Applicants. In this application the Applicants

seek an order that this Court extend the time period as set out in section 7 of the Promotion of Administrative Justice Act[4] ("PAJA") and condone any delay in the institution of this application in terms of subsection 9(1)(b) of PAJA; reviewing and setting aside the award; ordering CSOS to rehear and reconsider the dispute between the applicants and the BC, together with an appropriate order in respect of costs.

- [5] This application is not opposed by either CSOS or the adjudicator who have elected to abide by the decision of this Court. However, the application is opposed by the BC. The implication of the foregoing and the true nature of the costs order sought by the Applicants in the present application, will be dealt with later in this judgment.
- [6] It was always the intention of this Court to deliver a written judgment in this matter. In light of, inter alia, the onerous workload under which this Court has been placed, this has simply not been possible without incurring further delays in the handing down thereof. In the premises, this judgment is being delivered ex tempore. Once transcribed, it will be "converted" or more correctly "transformed", into a written judgment and provided to the parties. In this manner, neither the quality of the judgment nor the time in which the judgment is delivered, will be compromised. This Court is indebted to the transcription services of this Division who generally provide transcripts of judgments emanating from this Court within a short period of time following the delivery thereof on an ex tempore basis.

The issues

- [7] From the foregoing, it is clear that the principal issues which it is incumbent upon this Court to decide are twofold, namely:

- (a) should this Court extend the time limits in terms of PAJA and grant to the Applicants' condonation as sought and, if granted;
- (b) whether the award is reviewable, should be set aside and the dispute be referred back to CSOS for a rehearing and reconsideration.

#### Extension of time limits and condonation

- [8] It being common cause between the parties that the award constitutes "administrative action" within the meaning of section 1 of PAJA, it is susceptible to judicial review. In the premises, PAJA applies and since this application was instituted approximately seven and half months late (outside of the three-month limit as set out in PAJA) it is necessary for the Applicants to make application for the extension of the said time limits and condonation in respect thereof.
- [9] In the matter of *Gqwetha v Transkei Development Corporation Ltd and Others*[5] the Supreme Court of Appeal ("SCA") provided some invaluable guidelines for a court to apply when exercising its discretion whether to entertain an administrative review where there had been a delay. As held by Nugent JA (writing for the majority):[6]

"[22] It is important for the efficient functioning of public bodies (I include the first respondent) that a challenge to the validity of their decisions by proceedings for judicial review should be initiated without undue delay. The rationale for that longstanding rule – reiterated most recently by Brand JA in *Associated Institution Pension Fund and Others v Van Zyl and Others* 2005 (2) SA 302 (SCA) at 321 is twofold: First, the failure to bring a review within a reasonable time may cause prejudice to the respondent. Secondly, and in my view more importantly, there is a public interest element in the finality of administrative decisions and the exercise of administrative functions. As pointed out by Muller JA in *Wolgroeiërs Afslaaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A) at 41 E – F (my translation):

'It is desirable and important that finality should be arrived at within a reasonable time in relation to judicial and administrative decisions or acts. It can be contrary to the administration of justice and the public interest to allow such decisions or acts to be set aside after an unreasonably long period of time has elapsed – interest reipublicae ut sit finis litium.....Considerations of this kind undoubtedly constitute part of the underlying reasons for the existence of this rule.'

- [23] Underlying that latter aspect of the rationale is the inherent potential for prejudice, both to the efficient functioning of the

public body, and to those who rely upon its decisions, if the validity of its decisions remains uncertain. It is for that reason in particular that proof of actual prejudice to the respondent is not a precondition for refusing to entertain review proceedings by reason of undue delay, although the extent to which prejudice has been shown is a relevant consideration that might even be decisive where the delay has been relatively slight (*Wolgroeiërs Afslaaers*, above, at 42C).

[24] Whether there has been undue delay entails a factual enquiry upon which a value judgment is called for in the light of all the relevant

circumstances including any explanation that is offered for the delay (Setsokosane Busdiens (Edms) Bpk v Voorsitter, Nasionale

Vervoerkommissie 1986 (2) SA 57 (A) at 86D-F and 86I-87A). A material fact to be taken into account in making that value judgment – bearing in mind the rationale for the rule – is the nature of the challenged decision. Not all decisions have the same potential for prejudice to result from their being set aside.[7] [Emphasis Added.]

[10] The Applicants, in support of their application for an extension of the time period in which to institute this application and condonation for their failure to do so within the stipulated time period as provided for in terms of PAJA, rely on, inter alia, the following facts and submissions, namely:

10.1 after the delivery of the award by the adjudicator the Applicants sought the advice of their architect as how best to resolve the issues between themselves and the BC relating to the rooftop garden. The Applicants aver that their focus was on reaching a compromise with the BC;

10.2 during or about June 2021 to August 2021 the Applicants sought to mediate those disputes with the assistance of a neighbour. This neighbour then passed away in August 2021;

10.3 thereafter, the Applicants engaged in ongoing attempts at resolving the disputes between the parties by, inter alia, making proposals to the BC. These proposals were made to the BC on 13 September 2021 (only rejected by the BC on 15 October

2021) and on 13 March 2022 (rejected by the BC on 28 March 2022);

10.4 in addition, during the foregoing period the Applicants suffered from various personal difficulties (sickness; retrenchment and the loss of a parent) which resulted in delay;

10.5 on 21 April 2022, a letter requesting certain documents necessary for consideration of the Applicants' position was delivered by the Applicants to the BC. The BC refused to provide the documents to the Applicants. As a result thereof the Applicants approached CSOS and requested that the BC be ordered to provide them with the documents;

10.6 on 30 May 2022 the BC conceded that access to such documents would be provided;

10.7 the first opportunity to consult with Counsel was 2 June 2022; and

10.8 the Applicants' Notice of Motion is dated 10 July 2022.

- [11] This application for the extension of the prescribed time limit in terms of PAJA to institute this application and condonation in respect thereof, is opposed by the BC. The principal ground upon which this opposition is based is that the BC has been prohibited, by these review proceedings, from enforcing the award which was granted on 31 May 2021. In this regard, this Court understands that the BC relies primarily on the issue of prejudice as to why this Court should not grant the Applicants the relief sought.
- [12] During the course of argument, Advocate van der Laarse, who appeared for the BC, submitted (whilst she correctly conceded that the BC could not factually dispute any of the grounds relied upon by the Applicants as set out above) that the Applicants had failed to provide sufficient details and timelines in respect of the reasons for the delay. Relying thereon, it was submitted that this Court should reject those reasons as put forward by the Applicants in the Founding Affidavit.
- [13] This submission cannot be accepted by this Court. In the first instance, as previously noted, none of the averments made by the Applicants, on oath, are seriously disputed (if disputed at all) by the BC. Moreover, the Applicants have, where applicable and without burdening these application papers unnecessarily, produced documentary evidence in support of the material averments made in respect of the reasons for delay.
- [14] With regard to the issue of prejudice so heavily relied upon by the BC, it was also conceded (correctly in the opinion of this Court) that the BC, on its own version, only initially sought to enforce the award during March 2022 and the BC's own attorneys delayed in seeking to do so until 23 June 2022. This is more than one year after the delivery of the award on 31 May 2021. In the premises, the submission made on behalf of the Applicants that any prejudice to the BC is self-created, must carry considerable weight.
- [15] Of course, when assessing an application for an extension of the time limit and condonation in terms of PAJA the court must consider all relevant factors, including the nature of the relief sought; the extent and cause of the delay; its effects upon the administration of justice and other litigants; the importance of the issues raised and the prospects of success in the intended proceedings. Prejudice and the degree thereof is an important (albeit not necessarily decisive) consideration.
- [16] Insofar as the nature of the relief is concerned, the award, being an award by an adjudicator of CSOS in terms of the CSOS Act, is one giving rise to administrative action and emanating from a public body (CSOS). In a narrow sense the importance of the

## issues

and the prospects of success both on review and in the dispute between the applicants and the BC, involve two parties, neither of

whom are public bodies. However, in the broader sense, the importance of the issues involved on review concern CSOS, which is a public body.

- [17] This is because the review proceedings (the present application) deal with, inter alia, important questions as to the manner of the proceedings before CSOS; the decision of the adjudicator to determine the dispute between the parties "on the papers" rather than hearing oral evidence from, inter alia, various expert witnesses and the Practice Directives ("the directives") of CSOS. As such, the review proceedings in the present matter involve issues pertaining to, inter alia, PAJA; the CSOS Act and the directives. In the premises, it would be highly prejudicial if, viewed in the broader sense, these issues were not ventilated on review.
- [18] Arising therefrom, this Court finds that, with regard to the question of prejudice (just one factor albeit an important one) the prejudice of not granting the relief sought (extension of the time limit and condonation) far outweighs any prejudice if that relief should be granted. Of course, in a narrow sense, the same can be said in respect of the right of the Applicants to have the present review application determined, which impacts directly on their constitutional right to fair administrative action. The prejudice they would suffer if the relief sought was refused, must far outweigh any prejudice suffered by the BC if the relief was granted, particularly in light of the fact that any such prejudice to the BC has been largely self-created.[8]
- [19] With regard to the prospects of success insofar as the dispute itself is concerned, it is extremely difficult for this Court, due to the very nature of that dispute, to come to any real finding in respect thereof. Suffice it to say, at worst for the Applicants, the prospects of success must be evenly balanced between them and the BC. Put another way the opposition by the Applicants to the relief sought by the BC and the relief sought by the Applicants in the same application to CSOS, should the award be reviewed and set aside by this Court, is not devoid of any prospects of success.
- [20] Further, once again having particular regard to the nature of the present application and the ultimate dispute, it is the opinion of this Court that, in addition to the prospects of success in that dispute being one of the relevant factors to be considered by this Court when asked to extend the prescribed time limit in PAJA and condone the late institution of a review application in terms of PAJA, the prospects of success in the present application (the review application) should also be a factor. In the premises, this Court would, with the greatest respect, add this factor to those so eloquently listed by Nugent JA in *Gqwetha*. [9] The reasons therefore are simple. An application for the time limit to be extended and condonation to be granted in respect

thereof, should not be refused if, for example, one of the factors was that it was difficult (or virtually impossible) to determine what the prospects of success in the dispute may be. To do so in such a case when the prospects of success in the review application for an applicant are good, clearly cannot be in the interests of justice. It would therefore seem that the prospects of success in the review application itself, should not be ignored.

[21] This "additional" factor is considered in the present matter with the qualification that it is just one of the factors to be considered when considering whether or not this Court should grant the Applicants the relief sought. It is not for one moment the proposition of this Court that such a factor (either in the present matter or future matters), should be elevated or rank above all other factors in importance. To do so would not only be in conflict with our existing jurisprudence

but would not be in harmony with the relevant statute.[10] Finally on this point the prospects of success, insofar as they pertain to the present application for the review and setting aside of the award, must be accepted to be good. This will be dealt with later in this judgment.

[22] Having regard to all of the foregoing, it is the finding of this Court that it would be in the interests of justice if the prescribed time limit, as set out in PAJA, be extended and that the failure of the Applicants to institute this review application within the prescribed time limit is condoned. An appropriate order to that effect follows at the end of this judgment.

The review application

The facts

[23] The relevant facts which are either common cause or cannot be seriously disputed by either party in this application are, inter alia, the following:

23.1 on 2 December 2020 the adjudicator advised that the Applicants should provide their submissions in response to those made by the BC by 10 December 2020. When these directions were given by the adjudicator the applicable CSOS Practice Directive ("the PD") provided for a period of seven (7) days within which to respond. The time period given to the Applicants equated to only six (6) business days;

23.2 on 19 April 2021 the adjudicator directed that both parties provide final written submissions by 23 April 2021. This was a period of only four (4) days. Final submissions in terms of the PD should have been called for on five (5) working days' notice from the adjudicator;

23.3 no date was chosen by the adjudicator for the hearing of the dispute. Rather, the parties were simply advised that the matter would be decided by the adjudicator "on the papers". In the premises, there was no attendance by either of the parties at any hearing. No hearing was held either telephonically or virtually, as provided for in the PD;

23.4 the Applicants' request to provide evidence by way of a "site visit" (inspection-in-loco) was refused by the adjudicator;

23.5 none of the submissions placed before the adjudicator were confirmed under oath;

23.6 the adjudicator did not call for any evidence;

23.7 the PD is to be read at all times with relevant provisions of the CSOS Act. If there is a conflict the provisions of the CSOS Act will prevail.

The grounds of review.

[24] Broadly speaking the grounds of review relied upon by the Applicants and based upon, *inter alia*, the facts of this matter and the award, are the following:

24.1 lack of procedural fairness;

24.2 arbitrary or capricious exercise, alternatively, failure to exercise, discretion and failure to comply with mandatory/material procedures;

24.3 irrelevant considerations considered and relevant considerations not considered; administrative action not rationally connected to information before the adjudicator or to the award;

24.4 irrationality and immaterial error of law;

24.5 the adjudicator misconstrued his powers and committed an error of law;

24.6 the administrative action is so unreasonable that no reasonable person could have taken it; and

24.7 the administrative action is otherwise unconstitutional and unlawful.

[25] As can be seen from the foregoing, Advocate Felgate, on behalf of the Applicants, sought to impugn the award on many varied and broad (whilst often inter-related) grounds. It is not the intention of this Court to burden this judgment unnecessarily by dealing with each and every ground in great detail. This is particularly so, in light of the correct principles of law to be applied to the accepted facts of this matter and the important concessions made on behalf of the BC, as dealt with hereunder.

The law

[26] The "silver bullet" delivered by Advocate Felgate on behalf of the Applicants, during the course of argument, was the Applicants' reliance upon the matter of *Silverlakes Homeowners Association v Community Schemes Ombud Service and Others*.<sup>[11]</sup> This matter was remarkably similar, if not on "all fours" with the matter presently before this Court. In the premises, it forms invaluable assistance when deciding this matter, not only in respect of the facts but also in respect of the applicable legal principles.

[27] In *Silverlakes*, not only is the adjudicator the same adjudicator who made the award in the present matter<sup>[12]</sup> but both disputes were heard and both awards were made, when the identical Practice Directive of CSOS was applicable and in force.

This was confirmed during the course of argument with counsel for the applicants and the BC. Further, in *Silverlakes*<sup>[13]</sup> it was common cause between the parties that the adjudicator:

27.1 failed to conduct a hearing, either "face to face" (in person), virtually or telephonically; and

27.2 failed to invite any further submissions from the Applicants subsequent to the "replying" submissions delivered by the First Respondent to the Third Respondent.

[28] In addition to the foregoing, the adjudicator in Silverlakes took a different approach to the one he adopted in the present matter and did not afford the parties an opportunity to submit final

submissions, either orally or in written form.

[29] A further similarity between Silverlakes and the present matter is borne out when one considers the grounds relied upon by the Applicant in Silverlakes and the Applicants in the review application presently before this Court. In that regard, the Applicant in Silverlakes raised two grounds for the review of the adjudicator's award, namely:

- (a) the adjudicator's failure to afford the parties a hearing that was procedurally fair; and
- (b) the award was materially influenced by an error of law.[14]

[30] Possibly the greatest similarity between Silverlakes and the present matter, is that in Silverlakes, during the course of argument, Counsel for the Third Respondent conceded that the procedure adopted by the adjudicator was procedurally unfair as per the first ground of review relied upon by the Applicant.[15] The court accordingly held that in light of that concession, which had been properly and correctly made, it was unnecessary for the court to deal with the second ground of review.

[31] During the course of argument before this Court in the present matter, Advocate van der Laarse (for the BC), faced with the facts of this matter and the decision of the court in Silverlakes, also (correctly and properly in the opinion of this Court) conceded that the procedure adopted by the adjudicator was procedurally unfair. In fact, this Court understood the concessions made by Advocate van der Laarse to go even further (once again correctly and properly in the opinion of this Court) in that it was conceded, in light of the facts of this matter; the correct principles of law to be applied and the decision in Silverlakes (which Advocate van der Laarse accepted to be correct) the award in the present review application should be reviewed and set aside.

[32] In light of the foregoing, this Court is of the opinion (as was the court in Silverlakes) that it is not necessary for this Court to consider any of the other grounds of review, as relied upon by the Applicants.[16] This Court does not wish to burden this judgment unnecessarily. However, lest this Court be criticised for placing too much emphasis

on the concessions made by Advocate van der Laarse, on behalf of the BC, as dealt with above, it is expedient for this Court to set out, very briefly, the rationale for arriving at a finding that there was a lack of procedural fairness which must result in the award being reviewed and set aside. In doing so (and, once again, to avoid burdening this judgment unnecessarily) this Court refers to the dicta of the learned Acting Judge in Silverlakes where it was held that:[17]

*"[19] The empowering provisions in terms whereof the Adjudicator issued the adjudication order are the Act and Regulations and Practice*

Directives issued by the First Respondent. In a Practice Directive on dispute resolution dated August 2019, Part 5 thereof, provision is made for a process of adjudication where parties to a dispute appear before the Adjudicator. Only in the event that both parties consent may the process of adjudication be disposed of in absentia of the parties, or when a party is in default to appear at the adjudication hearing which was duly set down.

[20] In a Practice Directive issued during 2019, which applied during the so-called "Covid lockdown period" when the impugned order was issued provision was made for no "face-to-face" adjudications but instead for virtual and/or telephonic hearings. Paragraph 8.3 of this Directive reads:

"8.3 The Adjudicator may at his or her discretion conduct the adjudication telephonically or virtually. Parties in a dispute are requested to have sufficient data, bandwidth, battery-life or connectivity for the duration of the Conciliation."

[21] There is no provision in the Act, the Regulations in terms of the Act, or the Practice Directives issued in terms of the Act which empowers an Adjudicator to exercise his/her own discretion to issue an adjudication order without an adjudication hearing. It is clear that the provisions of the Act, the Regulations in terms of the Act and the Practice Directives envisage a Tribunal where the Adjudicator is enjoined to dispose of disputes between parties in a quasi-judicial manner which requires at its very basic tenant the application of the audi alteram partem principle.

[22] The Adjudicator's failure to afford the parties and in particular the Applicant the opportunity to present and argue its case renders the procedure followed by the Adjudicator reviewable under Section 3(1) of PAJA read with Section 3(2)(b)(ii), having regard to the objects of the empowering provision (the Act) which is to resolve disputes between parties who have competing interests in a dispute which falls within the jurisdiction of the First Respondent. In the result, the impugned order falls to be set aside on review."

[33] This Court unreservedly accepts and applies those dicta (wherever applicable) to the present matter before this Court.

[34] It must follow that, as a result of the above, there were numerous other failings with the so-called hearing which rendered the procedure adopted unfair and which provided a basis for many (if not all) of the other grounds for review as relied upon by the Applicants. These should be glaringly obvious, not the least of which is the adjudicator's decision to base his award on submissions

which were not confirmed under oath; never tested by cross-examination or, at the very least, some investigation by the adjudicator himself. This is particularly so having regard to the nature of this particular matter and the relevance of certain expert evidence.

[35] Having regard to all of the foregoing, it is the finding of this Court that the award should be reviewed and set aside. Further, CSOS should be ordered to rehear and reconsider the dispute between the parties.

#### Costs

[36] The Applicants, in their Notice of Motion, sought an order for costs in the following terms:

"That the costs of this application be paid for by the First Respondent (CSOS), alternatively, in the event of opposition by the Second (the adjudicator) or Third (BC) Respondents, by the First and Second and/or Third Respondents jointly and severally, the one paying the other to be absolved."

[37] During the course of argument before this Court, Counsel for the Applicants conceded (correctly in the opinion of this Court) that CSOS and the adjudicator were, to a large extent, protected in terms of the CSOS Act, in that a cost award could only be made against them if it were found that they acted "unlawfully, with gross negligence or in bad faith".[18] Following therefrom, this Court understood that the Applicants no longer sought an order for costs against CSOS (who had, in any event, like the adjudicator, elected to abide the decision of this Court) but persisted in seeking an order for costs against the BC who had opposed the review application.

[38] On behalf of the BC, Advocate van der Laarse submitted to this Court that even in the event of this Court reviewing the award and setting it aside, the BC should not be ordered to pay the costs of the review application. This submission was based, *inter alia*, on the fact that the BC would, in all likelihood, be obliged to raise a special levy to cover the costs of this litigation. It was further submitted that the opposition of the BC was reasonable and that when the application was opposed, the judgment in Silverlakes had not yet come to the attention of the BC.

[39] As to the first submission, the fact that the BC may (or may not) have to raise a special levy to fund this litigation, is not, in the opinion of this Court, a significant factor which this Court should consider when exercising its discretion whether or not to order the BC to pay the costs of the review application. The BC must have been well aware of the risks involved when entering into this litigation. It cannot now, at this late stage, faced with the possibility of "footing the bill", attempt to convince this Court to deviate from the normal costs order where costs should follow the result and grant an order, as submitted by Advocate van der Laarse, that each party pay their own costs.

[40] As to the second submission made on behalf of the BC, relating to the fact that, at the time this application was opposed, the BC was unaware of the decision in Silverlakes, essentially the same reasoning must apply. As dealt with earlier in this judgment, the decision of this Court to review and set aside the award is not based solely on the ground of procedural unfairness as set out, *inter alia*, in Silverlakes. This ground of review, whilst sufficient as a "stand-alone" ground to arrive at the decision which this Court has reached, is only a starting point and, as set out herein, many (if not all) of the grounds of review as raised by the

applicants in this application are sound, both on the facts and in law.

[41] It was simply as a matter of expediency and in light of the concessions made on behalf of the BC, that these remaining grounds of review have not been fully dealt with in this judgment. In any event, even accepting that this had been the sole ground of review relied upon by the Applicants in this application, the ignorance of a judgment in favour of another party can seldom (if ever) be a valid defence to an order for costs. As useful and as instructive as the judgment in *Silverlakes* may be (and in this particular case the fact that it is clearly on point) the principles of law as enunciated therein and applied to the facts, are not novel. *Silverlakes* sets out no "new law" and, as such, the BC (or more particularly the legal representatives of the BC) should have been well aware thereof when electing to oppose the relief sought by the Applicants.

[42] The final submission made on behalf of the BC in respect of costs perhaps carries the most weight and, in some respects, deserves the most consideration. Once again, *Silverlakes* provides some assistance to this Court since, in *Silverlakes*, the identical argument was placed before the court. More particularly, in that matter, it was submitted, on behalf of the Third Respondent, that the Third Respondent was not to blame for the fact that the adjudicator followed an irrational process which had

rendered the adjudication process reviewable. The learned Acting Judge noted, that whilst this argument may have a measure of attraction, considering the background to the dispute between the parties the fact remained that it was only the Third Respondent who had opposed the application and no reason therefore existed why the normal principle, namely that costs should follow the event, should not apply.[19] The court accordingly ordered the Third Respondent (the registered owner of immovable property within a scheme) to pay the costs of the review application.

[43] In doing so, the Court in *Silverlakes* followed the trite principle that costs should, in the normal course, follow the result unless "unusual circumstances" exist. It is also trite however that a court has a general discretion when it comes to the issue of costs, which it must obviously exercise judicially, having regard to the facts of a particular case. These principles are trite and this judgment (once again) will not be burdened unnecessarily by referring to the numerous authorities in support thereof. In addition thereto, Van Niekerk AJ, in *Silverlakes*, followed the same cost order made in the matter of *Naidoo v Chicktay N.O. and Others*,[20] where the Third Respondent (the Body Corporate) was ordered to pay the costs of the review application. In *Naidoo*, the court ultimately reviewed and set aside an award of CSOS as a result of the failure of an adjudicator to comply with certain critical provisions of PAJA. As set out above, Wilson AJ (as he then was) ordered the Third Respondent and not CSOS, or the adjudicator, to pay the costs of the application for the review and setting aside of the adjudicator's award.

- [44] It is not clear from the judgment in Naidoo whether (a) the Applicant sought an order for costs in respect of CSOS or the adjudicator on a joint and several basis in the event of those respondents opposing the review application, or (b) whether the review application was in fact opposed by either CSOS or the adjudicator. From the appearances at the end of the judgment it is clear that neither of these parties were represented at the hearing. It is therefore fairly safe to accept that they did not oppose the relief sought by the Applicant in that matter. This would also be in line with the general attitude adopted by both when parties seek to have an award made by an adjudicator of CSOS reviewable and set aside. Finally, it should be noted that the Court in Naidoo gave no reasons in the judgment for the costs order that it made. From that set out above, the only reasonable inference that can be drawn was that this was on the basis that the Third Respondent was the only respondent who opposed the review application and that opposition was unsuccessful.
- [45] What is apparent from an extremely cursory examination of the fairly recent authorities involving review applications arising from awards made by CSOS, is that (a) CSOS and/or the appointed adjudicator never, or, at least very seldom, oppose such an application, regardless of the grounds for review and even where (as in the present matter) a costs order is sought against CSOS and (b) our courts are slow to exercise their discretion to award costs against CSOS and/or an appointed adjudicator, alternatively, there is yet to be a matter, or there have been very few matters, where either CSOS or the adjudicator has acted unlawfully; with gross negligence or in bad faith, thereby attracting an adverse order for costs.
- [46] The rationale behind the foregoing is understandable. When the CSOS Act came into operation on 7 October 2016, this was the date upon which CSOS effectively became operational as an Ombudsman for community schemes. The primary purpose of the CSOS Act was to establish an efficient, cost-effective and independent dispute resolution service in respect of community schemes.[21] CSOS is funded primarily through levies payable by those community schemes and the members of those schemes (owners of immovable property) which it services.
- [47] Against this background, it is perhaps logical that the legislature sought to protect CSOS and its appointed adjudicators. Hence the "indemnity" extended to both in terms of sections 33 and 37 of the CSOS Act.[22] The question which must be asked however is whether this protection, or more particularly the extent of that protection, is warranted, or even justified, in our present constitutional dispensation.
- [48] At first blush the answer to the aforesaid question would appear to be a simple one. In a dispute resolution process between two "warring" parties, it would seem imminently reasonable (and appropriate) to protect the "umpire" of that dispute by making it (CSOS) and him or her (the adjudicator), virtually immune from any adverse order in respect of costs. CSOS is, after all, a creature of statute created solely to serve the best interests of community schemes and individual homeowners. It and its appointed adjudicators should be entitled to carry out their duties independently and free of any threat of financial sanctions which may

inhibit them from doing so.

[49] The fallacy of this argument, however, is exposed if one compares CSOS, even in a broad sense, to another creature of statute, namely the Road Accident Fund ("the RAF"). It is well-established that the RAF was created by the Road Accident Fund Act[23] ("the RAF Act") to compensate victims of motor vehicle accidents and is funded, to a large extent, through the petrol levies paid by motor vehicle drivers and public road users. Yet, the RAF receives little or no protection in terms of the RAF Act in respect of cost orders made in favour of injured parties (and other litigants) by our courts. To the contrary, countless orders for costs are granted by our courts against the RAF on a daily basis, often on a punitive scale.

[50] In the premises, it appears to be non-sensical that, in the case of the RAF, a court is entitled to exercise its general discretion in respect of costs when an injured party (or any other party for that matter) seeks a costs order against the RAF but, in the case of CSOS, or an appointed adjudicator of CSOS, a court is restrained from exercising that general discretion by the imposition

of a "higher standard". This standard is imposed by the very statute which created the body which was meant to provide a valuable service to community schemes and their members who, it must be emphasised, contribute financially to the running of that body.

[51] In addition thereto, it must be remembered that any negligence on the part of CSOS and its appointed adjudicators may well lead to severe financial prejudice to the very parties whom they were meant to serve. If the dispute is not resolved properly, this can lead to the parties incurring further legal costs (through either the narrow appeal process or through an application for review) without the ability of ever being able to recover those costs from the party truly (or at the very least partly) responsible (CSOS and/or the appointed adjudicator). In this regard (as is clear from those authorities cited in this judgment) the court is generally restricted to granting costs orders between the respective parties involved in the dispute.

[52] In order for CSOS, or an adjudicator, to be liable for costs, a court would have to find that they acted either unlawfully or with gross negligence or in bad faith. It is the opinion of this Court that the protection afforded by the legislature to CSOS and its appointed adjudicators in respect of "unlawfulness" and "bad faith" presents little difficulty, either from a practical or a constitutional perspective. The same, however, cannot be said for the requirement of "gross negligence".

[53] In the matter of Transnet Ltd t/a Portnet v The Owners of "MV Stella Tingas" and Another, [24] the SCA held, inter alia, the following:[25]

"It follows, I think, that to qualify as gross negligence the conduct in question, although falling short of *dolus eventualis*, must involve a departure from the standard of the reasonable man to such an extent that it may properly be categorised extreme; it must demonstrate, where there is found to be conscious risk-taking, a complete obtuseness of mind, or where there is no conscious risk-taking, a total failure to take care. If something less were required, the distinction between ordinary and gross negligence would lose its validity." [Emphasis added]

- [54] The foregoing dicta clearly demonstrates the extent to which the provisions of the CSOS Act have been extended to protect CSOS and its appointed adjudicators from having costs orders awarded against them. This is so, even in cases where, for example, it can be shown, by one or other of the parties to a dispute, that the adjudicator was negligent in the manner in which he dealt with that dispute, either in terms of the CSOS Act and/or a Practice Directive issued by CSOS itself.
- [55] In light of the foregoing, it is the opinion of this Court that the legislature should give serious consideration to effecting a suitable amendment to subsection 33(b) of the CSOS Act by deleting the word "grossly" where it appears before the word "negligent". By doing so the balance between protecting the interests of CSOS and its employees (including its appointed adjudicators) and the rights of the parties appearing at the proceedings before CSOS in order to resolve their disputes, would be maintained in the best interests of all role-players. Most importantly, such an amendment would be in the interests of justice and in conformity with the principles of our constitutional democracy.
- [56] Insofar as the protection of those constitutional principles and rights are concerned the constitutional validity of either the whole or part of section 33 of the CSOS Act was never properly raised in the present application before this Court. In the premises, it would be improper (this is trite) for this Court to make any findings in respect thereof.
- [57] Returning to the present issue of costs, it is clear that the actions (and inactions) of the adjudicator in the manner in which he conducted the hearing and compiled the award, were regrettable. Whilst the foregoing may (at best for the applicants) be attributed to negligence on his part, it cannot be said that they pass muster as "gross negligence". In the premises, there are no grounds upon which this Court can, in the exercise of its discretion, order either CSOS or the adjudicator to pay the costs of the review application, either in whole, or jointly and severally with the BC.
- [58] As already dealt with in this judgment the submission by Advocate van der Laarse that the BC, like the Applicants, is also a victim of the irrational manner in which the adjudicator carried out the hearing in this matter, does carry some weight. However, as also dealt with earlier herein, not only is this Court's discretion as to costs severely curtailed by the applicable statute pertaining to this matter but the BC had ample opportunity to consider its position. Despite having this opportunity and, unlike the position so often adopted by CSOS and its appointed adjudicators (for other perhaps less commendable reasons), elected not to simply abide the decision of this Court, alternatively, as difficult as a decision as it may have

been, even consent to the review of the award and to having the award set aside. At the end of the day the BC elected to oppose the application for review and the Applicants are entitled to their costs.

## Order

[55] This Court makes the following order:

1. The time period of 180 days as set out in section 7 of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") for the institution of this application is extended to the date upon which this application under case number 2022-006069 was filed and the delay in the institution of this application is condoned in terms of subsection 9(1)(b) of PAJA.
2. The award dated 31 May 2021 under reference number CSOS02088/GP/20, attached to the Founding Affidavit of the Applicants in this application under case number 2022-006069 as annexure "FA3", is reviewed and set aside.
3. The First Respondent (the Community Schemes Ombud Service) is ordered to rehear and reconsider the dispute between the Applicants and the Third Respondent as lodged with the First Respondent under reference number CSOS02088/GP/20 ab initio.
4. The Third Respondent (Devon Place Body Corporate) is to pay the costs of this application.

B. C. WANLESS

JUDGE OF THE HIGH COURT

JOHANNESBURG

Date of hearing:

29 August 2023

Date of ex tempore judgment: 29 February 2024

Date of written (revised) judgment 10 July 2024

## Appearances

On behalf of the Applicant:

Adv. N. Felgate

Instructed by:

JV Rensbrugg Kinsella Inc.

On behalf of the First Respondent: Not opposed (no appearance)

On behalf of Second Respondent: Not opposed (no appearance)

On behalf of the Third Respondent: Adv. Y. van der Laarse

Instructed by:

Ceronio Attorneys

[1] Act 9 of 2011.

[2] Act 95 of 1986.

[3] Act 8 of 2011.

[4] Act 3 of 2000.

[5] [2005] ZASCA 51; 2006 (2) SCA 603 (SCA).

[6] At

[22] to [24].

[7] See also *Camps Bay Ratepayers' and Residents' Association v Harrison* [2010] ZASCA 3; [2010] 2 All SA 519 (SCA) at [53].

[8] See n6 *ibid* at paragraph [14].

[9] See n6 *Id* [9].

[10] Section 9(2) of PAJA.

[11]

[2023] ZAGPPHC 281.

[12] *Id* at [1].

[13] *Id* at [12].

[14] *Id* at [17].

[15] *Id* at [18].

[16] *Ibid* at [24].

[17] *Ibid* at [19] to [22].

[18] Sections 33 and 37 of the CSOS Act.

[19] See *Silverlakes* at [23].

[20] 2022 JDR 3522 (GJ).

[21] Estate Life Magazine, an introduction to the CSOS – 12 April 2018.

[22] Paragraph

[37] *ibid*; footnote 18 *ibid*

[23]Act 56 of 1995.

[24] [2003] 1 ALL SA 286 (SCA) (27 November 2002)

[25]Ibid paragraph [7] per Scott JA.

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